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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91201995
Party	Plaintiff Mendias & Milton, LLC
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Date	11/18/2012
Attachments	(19) Motion for Summary Judgment.pdf (33 pages)(3713017 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:	Fitfast, LLC.
Serial No.:	85/017519
Filed:	April 19, 2010
Trademark:	FITFOOD
Int'l Classes:	43
Published:	September 13, 2011

MENDIAS & MILTON, LLC, Opposer,	§	
v.	§	Opposition No. 91201995
FITFAST, LLC., Applicant.	§	

OPPOSER'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Opposer, Mendias & Milton, LLC ("Opposer"), moves for summary judgment in Opposition No. 91201995 filed with Trademark Trial and Appeal Board ("Board") against Applicant Fit Fast, LLC.'s ("Applicant") trademark application U.S. Ser. No. 85/017519 for the mark FITFOOD ("Applicant's Mark"). Opposer's opposition is based on a likelihood of confusion between Applicant's Mark and Opposer's MY FIT FOODS mark ("Opposer's Mark") and its registered MY FIT FOODS & Design Mark, U.S. Reg. No. 3,823,950 ("Registered Mark"). *See* Exhibit A. On July 17, 2012, Opposer served Applicant with Opposer's First Set of Discovery Requests, which included Opposer's First Set of Requests for Admission to Applicant. *See* Exhibit B, showing Opposer's First Set of Requests for Admission to Applicant. Opposer included in Opposer's First Set of

Requests for Admission an admission by Applicant that there is a likelihood of confusion between Applicant's Mark and Opposer's Mark. *See* Exhibit B, pt. II, ¶ 21. Under Rule 36 of the Federal Rules of Civil Procedure, Applicant's responses to Opposer's First Set of Discovery Requests were due thirty days after service thereof. Applicant has not responded, even after being prompted by Opposer's counsel to respond, and the discovery period has since closed. Based on Applicant's failure to respond, Applicant is deemed to have admitted that there is a likelihood of confusion between Applicant's Mark and Opposer's Mark. *See* Fed. R. Civ. P. 36(a)(3). Furthermore the Board's Order, dated November 14, 2012, expressly stated that Opposer's First Set of Requests for Admission were deemed admitted. *See* Exhibit C, Trademark Trial and Appeal Board's Order, dated November 14, 2012 p. 3. Thus, it is conclusively established that there is a likelihood of confusion between Applicant's Mark and Opposer's Mark. Fed. R. Civ. P. 36(b). Since no genuine issue of material fact remains and Opposer is entitled to judgment as a matter of law, Opposer moves for summary judgment in this Opposition.

II. Facts

Commencing at least as early as April 1, 2008, Opposer began using the mark MY FIT FOODS in connection with food preparation services and prepared meals. Opposer is also the owner of the U.S. Reg. No. 3,823,590 for the mark MY FIT FOODS & Design, which was filed with the U.S. Patent and Trademark Office ("USPTO") on September 29, 2008 and which registered on July 27, 2010 (the "Registration"). *See* Exhibit D showing a copy of the registration certificate for U.S. Reg. No. 3,823,590. The Registration covers "prepared meals consisting primarily of meat, fish, poultry or vegetables" in International Class 29 and "food preparation services featuring fresh,

properly proportioned, healthy meals designed to fuel metabolism and burn fat and made to order for delivery or pick up" in International Class 43.

Opposer first used the Registered Mark at least as early as April 1, 2008 in association with the preparation and sale of healthy, appropriately proportioned, nutritious meals as well as with prepared and packaged meals. Through the marketing of its goods and services, Opposer has created extensive good will and consumer recognition in Opposer's Mark and its Registered Mark, and the trade and purchasing public have come to recognize MY FIT FOODS as signifying Opposer and as identifying Opposer as the source of goods and services offered under both Opposer's Mark and its Registered Mark. As a result of Opposer's extensive marketing efforts, Opposer's Mark and its Registered Mark are now famous marks within the meaning of 15 U.S.C. § 1125(c).

On or about April 19, 2010, Applicant filed with the USPTO an application for FITFOOD, Ser. No. 85/017519 (the "Application"), seeking registration on the Principal Register. The Application covers use of the mark with "restaurant" services in International Class 43 and was filed based upon an intent to use the mark in commerce.

Opposer filed a Notice of Opposition against Applicant's Mark on October 11, 2011 based on a likelihood of confusion between Applicant's Mark and Opposer's Mark and Registered Mark. Opposer alleged that: (1) the restaurant services identified in the Application are closely related to Opposer's food preparation and take out services offered under Opposer's Mark and Registered Mark and are such that can be provided through the same channels of trade to the same prospective consumers; (2) in view of the similarity of the respective marks and the related nature of the services, Applicant's Mark

so resembles Opposer's Mark and Registered Mark as to be likely to cause confusion, or to cause mistake or to deceive; (3) the general public and others familiar with Opposer's Mark and Registered Mark will be likely to believe that Applicant's services have originated from Opposer or were offered in association or affiliation with, or under authorization by, Opposer; (4) Applicant's Mark, as used with its proposed services, will lead persons familiar with Opposer's Mark and Registered Mark to believe that Applicant's services are offered by, in association or affiliation with, or under license from, Opposer; (5) such confusion, mistake, and deception regarding the origin of Applicant's services are likely to cause irreparable harm to Opposer; (6) if Applicant is permitted to register Applicant's Mark for the services specified in the Application herein opposed, such use and registration will result in confusion in the trade due to the similarity between Applicant's Mark and Opposer's Mark and Registered Mark, thereby damaging and injuring Opposer; (7) any objection or fault found with Applicant's services marketed under Applicant's Mark may reflect upon and injure the reputation that Opposer has established for the goods and services offered under Opposer's Mark and Registered Mark; (8) Applicant's Mark, by reason of its similarity to Opposer's Mark and Registered Mark, will be able to gain a subliminal or subconscious association to such marks and thereby trade on the reputation of Opposer; (9) Opposer will be injured by the granting of a Certificate of Registration to Applicant for the Applicant's Mark because Applicant would obtain thereby at least a prima facie exclusive right to use such mark; (10) such registration would be a source of damage and injury to Opposer and the public; and (11) if Applicant is permitted to register Applicant's Mark for the services specified in the Application herein opposed, such use and registration would result in dilution of

Opposer's Mark and Registered Mark under 15 U.S.C. § 1125(c) thereby damaging and injuring Opposer. *See* Exhibit A, Opposer's Notice of Opposition.

On November 21, 2011, Applicant filed its answer to Opposer's Notice of Opposition. Opposer served Applicant with Opposer's Initial Disclosures on April 23, 2012, and on July 17, 2012, served Applicant with Opposer's First Set of Discovery Requests. Service of the Disclosures and Discovery Requests were provided by email, as mutually agreed by the parties during the Discovery/Settlement Conference held on March 20, 2012. Under Rule 36(a)(3) of the Federal Rules of Civil Procedure and the Rules of Practice Board, responses to Opposer's Discovery were due within thirty (30) days of service. *See* 37 CFR § 2.120(a)(3). Applicant has neither responded to any of Opposer's discovery requests nor has Applicant requested any extension of time to respond to any of Opposer's discovery requests, despite Opposer's attempt to prompt Applicant's response prior to the close of the discovery period. Discovery closed on September 20, 2012, and since that date, Applicant has still failed to respond to any discovery requests.

On October 23, 2012, Opposer filed a Motion to Compel Discovery with the Board and served Applicant with a copy of the same. Since that time, Applicant has neither responded to any of Opposer's discovery requests nor has Applicant requested any extension of time to respond to any of Opposer's discovery requests.

III. Opposer is Entitled to Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Genesco, Inc. v. Levi Strauss & Co.*, 219 U.S.P.Q. 1205, 1208 (T.T.A.B. 1983),

aff'd, 742 F.2d 1401, 222 U.S.P.Q. 939 (Fed. Cir. 1984); *Book Craft, Inc. v. Book Crafters USA Inc.*, 222 U.S.P.Q. 724, 725 (T.T.A.B. 1984). Opposer's motion must be granted if the pleadings, discovery depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *See Genesco, Inc.*, 219 U.S.P.Q. at 1208. A "default admission," an admission resulting from a party's failure to timely respond to an admission request, can serve as a basis for summary judgment. *See, e.g.*, *Le v. Cheesecake Factory Rests., Inc.*, No. 06-20006, 2007 U.S. App. LEXIS 5232, at *12 (5th Cir. Mar. 6, 2007) (finding that the district court properly granted summary judgment to the defendant on the basis of a deemed admission); *Carney v. IRS*, 258 F.3d 415, 420-22 (5th Cir. 2001) (relying on default admissions to support a grant of summary judgment); *Nintendo of America, Inc. v. Brown*, 94 F.3d 652 (9th Cir. 1996) (affirming entry of summary judgment on issue of trademark counterfeiting because failure to respond to admissions and interrogatories deemed admission of trademark counterfeiting); *Anchorage Associates v. Virgin Islands Board of Tax Review*, 922 F.2d 168, 176 n. 7 (3d Cir. 1990) (failure to controvert facts asserted in action challenging tax assessment constitutes default admission under local rules); *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 548-49 (5th Cir. 1985) (because plaintiffs did not respond to request for admissions for more than six months, court did not abuse its discretion in granting defendant's motion to strike untimely response); *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987) (default admissions used to establish liability in civil action brought for failure to pay federal income tax and fraudulent transfer of property).

There is no genuine issue of material fact remaining with respect to the opposition Applicant failed to respond to Opposer's First Set of Requests for Admission; therefore, Applicant is deemed to have admitted all of the requests. *See Fram Track Indus.v. WireTracks LLC*, 77 U.S.P.Q.2d 2000, 2005 (T.T.A.B. 2006) (noting that a request for admission is deemed admitted by the respondent's failure to respond to a petitioner's request for admission); *see also Pinnochio's Pizza Inc. v. Sandia Inc*., U.S.P.Q.2d 227, 1228 n.5 (T.T.A.B. 1989); *see* TBMP § 407.03(a). This is further supported by the Board's Order, dated November 14, which expressly ruled that Opposer's First Set of Requests for Admission were deemed admitted. See Exhibit C, p. 3. Accordingly, Applicant is deemed to have admitted that: (1) Opposer's Mark has been used continuously and exclusively in the United States since at least as early as April 1, 2008; (2) Opposer commenced use of Opposer's Mark prior to the filing date of the Application by Applicant; (3) Opposer's Mark and Applicant's Mark cover services that are likely to be directed through the same or similar channels of trade to the same or similar types of consumers; (4) Opposer's Mark and Applicant's Mark are similar enough for consumers to believe that they originate from the same source; (5) consumers who see Applicant's Mark are likely to assume that there is a connection or association with Opposer; (6) the dominant portion of Applicant's Mark and Opposer's Mark is "FIT FOOD;" (7) Opposer's Mark is well known and famous; (8) the term "FIT FOOD" is virtually identical to "FIT FOODS;" and (9) Applicant's Mark is not currently in use anywhere in the United States. *See* Exhibit B, pt. II. All of the above admissions support a finding as a matter of law that there is a likelihood of confusion between Applicant's Mark and Opposer's Mark and its Registered Mark.

Moreover, in Opposer's First Set of Requests for Admission, Opposer also requests an admission that there is a likelihood of confusion between Applicant's Mark and Opposer's Mark. *See* Exhibit B, pt. II, ¶ 21. Therefore, by failing to respond to such admission request, Applicant is also deemed to have admitted that there is a likelihood of confusion between Applicant's Mark and Opposer's Mark. Fed. R. Civ. P. 36(a)(3). Any matter admitted is conclusively established and cannot be rebutted. Fed. R. Civ. P. 36(b); *see also Carney v. IRS*, 258 F.3d 415, 420-22 (5th Cir. 2001); *American Auto. Ass'n. v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991). Thus, it is conclusively established that there is a likelihood of confusion between Applicant's Mark and Opposer's mark, and there is no genuine issue of material fact remaining in this opposition.

Opposer is entitled to judgment as a matter of law. Section 2 (d) of the Lanham Act states that:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it – . . . (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. . . .

15 U.S.C. § 1052. Applicant's failure to respond to Opposer's admission requests established conclusively that Applicant's Mark is likely to be confused with Opposer's Mark and its Registered Mark. Therefore, under Section 2 (d) of the Lanham Act, Applicant's Mark must be refused registration. Opposer is, therefore, entitled to

summary judgment as a matter of law and moves the Board to enter judgment in favor of Opposer and refuse registration of Applicant's Mark.

Dated: November 18, 2012

Respectfully submitted,

THOMPSON & KNIGHT LLP
ATTORNEYS FOR OPPOSER

/deborah l. lively/
Deborah L. Lively

One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1700
(214) 969-1751 (Fax)

517797 000002 5533983.1

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Motion for Summary Judgment has been served on Fitfast, LLC by email, per agreement of the parties, with a courtesy copy via First Class mail to:

Fitfast, LLC.
402 Heywood Ave.
Orange, New Jersey 07050

on this 18th day of November 2012.

Signed: /deborah l. lively/
Deborah L. Lively

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:	Fitfast, LLC.
Serial No.:	85/017519
Filed:	April 19, 2010
Trademark:	FITFOOD
Int'l Classes:	43
Published:	September 13, 2011

MENDIAS & MILTON, LLC, Opposer,	§	
v.	§	Opposition No. 91201995
FITFAST, LLC., Applicant.	§	

DECLARATION OF DEBORAH L. LIVELY IN SUPPORT OF
OPPOSER MENDIAS & MILTON, LLC'S
MOTION FOR SUMMARY JUDGMENT

My name is Deborah L. Lively, a partner with the law firm of Thompson & Knight LLP, 1722 Routh St., Suite 1500, Dallas, Texas 75201, (214) 969-1700. I am over the age of twenty-one, am of sound mind and memory, and am otherwise competent to provide the testimony in this Declaration. I am licensed to practice law in the State of Texas. I am counsel for Mendias & Milton, LLC in the above-captioned proceeding. This declaration, submitted in support of Opposer Mendias & Milton, LLC, is made on my own personal knowledge.

1. Opposer's Exhibit A is a true and correct copy of Notice of Opposition which was filed and served on Applicant on October 11, 2011.

2. Opposer's Exhibit B is a true and correct copy of Opposer's First Set of Requests for Admission to Applicant, which were served on Applicant on July 17, 2012.

3. Opposer's Exhibit C is a true and correct copy of the Trademark Trial and Appeal Board's Order, issued on November 14, 2012.

4. Opposer's Exhibit D is a true and correct copy of Opposer's Certificate of Registration for the Registered Mark, MY FIT FOODS & Design (U.S. Reg. No. 3,823,590).

5. The Trademark Trial and Appeal Board set the discovery period to close on September 20, 2012.

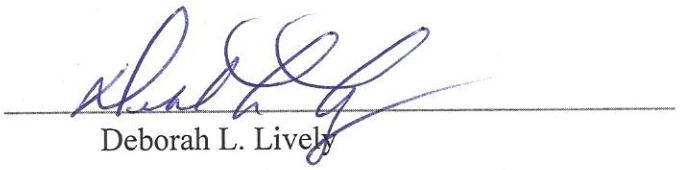
6. Prior to the close of discovery, Opposer's counsel requested a response to Opposer's discovery requests.

7. As of the date of filing this Motion, Applicant has not provided Opposer with responses or answers to Opposer's First Set of Discovery Requests and has not requested an extension of time to respond.

8. As of the date of filing this Motion, Applicant has failed to respond to Opposer's First Set of Requests for Admission.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of her own

knowledge are true; and all statements made on information and belief are believed to be true.



Deborah L. Lively

EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:	Fitfast, LLC.
Serial No.:	85/017519
Filed:	April 19, 2010
Trademark:	FITFOOD
Int'l Classes:	43
Published:	September 13, 2011

Mendias & Milton, LLC,	Opposer,	§ § §	
v.		§	Opposition No. _____
Fitfast, LLC.,	Applicant.	§ § § § § §	

NOTICE OF OPPOSITION

Mendias & Milton, LLC ("Opposer"), a limited liability company of Texas, having a corporate address of 3333 Allen Parkway #2507, Houston, Texas 77019, believes that it will be damaged by registration of the mark shown in Application Serial No. 85/017519 filed on April 19, 2010, in International Class 43, and hereby opposes the same.

As grounds for opposition, it is alleged that:

1. On or about April 19, 2010, Applicant, Fitfast, LLC., a limited liability company of New Jersey with a corporate address of 402 Heywood Ave., Orange, New Jersey 07050 ("Applicant"), filed an application with the U.S. Patent and Trademark Office, Application Serial No. 85/017519 (the "Application"), seeking registration on the Principal Register of the trademark "FITFOOD" ("Applicant's Mark). The Application

covers use of the mark with "restaurant" services in International Class 43 and was filed based upon an intent to use the mark in commerce.

2. Commencing at least as early as April 1, 2008, Opposer began using the mark MY FIT FOODS in connection with food preparation services and prepared meals ("Opposer's Mark").

3. Opposer is the owner of the U.S. Registration for MY FIT FOODS & Design, Reg. No. 3,823,590, which was filed on September 29, 2008 and registered on July 27, 2010 (the "Registration"). The Registration covers "prepared meals consisting primarily of meat, fish, poultry or vegetables" in International Class 29 and "food preparation services featuring fresh, properly proportioned, healthy meals designed to fuel metabolism and burn fat and made to order for delivery or pick up" in International Class 43.

4. Opposer first used the mark identified in its Registration ("Registered Mark") at least as early as April 1, 2008 in association with the preparation and sale of healthy, appropriately proportioned, nutritious meals as well as with prepared and packaged meals.

5 Through the marketing of its goods and services, Opposer has created extensive good will and consumer recognition in Opposer's Mark and Registered Mark, and the trade and purchasing public have come to recognize MY FIT FOODS as signifying Opposer and as identifying Opposer as the source of goods and services offered under the Opposer's Mark and Registered Mark.

6. As a result of Opposer's extensive marketing efforts, Opposer's Mark and Registered Mark are now famous marks within the meaning of 15 U.S.C. § 1125(c).

7. Opposer has continuously used its MY FIT FOODS mark and Registered Mark since at least April 1, 2008, and such use predates the April 19, 2010 filing date of the Application.

8. On information and belief, Opposer commenced use of Opposer's Mark and filed the application for the Registered Mark prior to any use of Applicant's Mark.

9. As the senior user of Opposer's Mark and Registered Mark, Opposer has priority rights over Applicant's Mark.

10. The restaurant services identified in the Application are closely related to Opposer's food preparation and take out services offered under Opposer's Mark and Registered Mark and are such that can be provided through the same channels of trade to the same prospective consumers.

11. In view of the similarity of the respective marks and the related nature of the services, Applicant's Mark so resembles Opposer's Mark and Registered Mark as to be likely to cause confusion, or to cause mistake or to deceive. The general public and others familiar with Opposer's Mark and Registered Mark will be likely to believe that Applicant's services have originated from Opposer or were offered in association or affiliation with, or under authorization by, Opposer. Thus, Applicant's Mark, as used with its proposed services, will lead persons familiar with Opposer's Mark and Registered Mark to believe that Applicant's services are offered by, in association or affiliation with, or under license from, Opposer. Such confusion, mistake, and deception regarding the origin of Applicant's services are likely to cause irreparable harm to Opposer.

12. If Applicant is permitted to register Applicant's Mark for the services specified in the Application herein opposed, such use and registration will result in confusion in the trade due to the similarity between Applicant's Mark and Opposer's Mark and Registered Mark, thereby damaging and injuring Opposer.

13. Furthermore, any objection or fault found with Applicant's services marketed under Applicant's Mark may reflect upon and injure the reputation that Opposer has established for the goods and services offered under Opposer's Mark and Registered Mark.

14. Additionally, Applicant's Mark, by reason of its similarity to Opposer's Mark and Registered Mark, will be able to gain a subliminal or subconscious association to such marks and thereby trade on the reputation of Opposer.

15. Opposer will be injured by the granting of a Certificate of Registration to Applicant for the Applicant's Mark because Applicant would obtain thereby at least a prima facie exclusive right to use such mark. Such registration would be a source of damage and injury to Opposer and the public.

16. If Applicant is permitted to register Applicant's Mark for the services specified in the Application herein opposed, such use and registration would result in dilution of Opposer's Mark and Registered Mark under 15 U.S.C. § 1125(c) thereby damaging and injuring Opposer.

WHEREFORE, Opposer respectfully prays that its Opposition be sustained and the application for registration, Application Serial No. 85/017519, by Applicant be denied and refused.

Dated: October 11, 2011

Respectfully submitted,

THOMPSON & KNIGHT LLP
ATTORNEYS FOR OPPOSER

Deborah L. Lively
Douglas C. Heuvel

One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1700
(214) 969-1751 (Fax)

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Notice of Opposition has been served on Fitfast, LLC by mailing said copy via First Class mail to:

Fitfast, LLC.
402 Heywood Ave.
Orange, New Jersey 07050

on this 11th day of October 2011.

Signed: _____
Deborah L. Lively

EXHIBIT B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MENDIAS & MILTON, LLC Opposer, v. FITFAST, LLC, Applicant.	OPPOSITION NO. 91201995

OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION TO APPLICANT

TO: FitFast LLC, Applicant, 402 Heywood Ave., Orange, New Jersey 07050-2007.

Pursuant to Rule 2.120 of the Trademark Rules of Practice of the Patent and Trademark Office and Rule 36 of the Federal Rules of Civil Procedure, Mendias & Milton, LLC, Opposer, directs the following admission requests to Applicant to be answered within thirty (30) days after service hereof.

I.
DEFINITIONS AND INSTRUCTIONS

1. "Opposer" refers to Mendias & Milton, LLC, its employees, officers, and agents, and to all other persons acting on its behalf or under its direction or control, including its representatives and attorneys, or any person acting on its behalf.

2. "Opposer's Mark" means the MY FIT FOODS mark, as defined in Opposer's Notice of Opposition.

3. "Applicant" refers to FitFast LLC and to its employees, officers, and agents, and to all other persons acting on its behalf or under its direction or control, including its representatives and attorneys, or any person acting on its behalf.

4. "Application" means application filed by Applicant for the FITFOOD mark (U.S. Ser. No. 85/017519).

5. "Applicant's Mark" means the mark for FITFOOD, which is the subject of the Application.

6. "Related Company" means any person whose use of a mark is controlled by the owner of the mark with respect to the nature of the quality of the goods or services on or in connection with which the mark is used, as defined under 15 U.S.C. § 1127.

7. The term "person" or "persons" means all entities, including, but not limited to, all natural persons, firms, partnerships, associations, joint ventures, corporations, single proprietorships, companies, proprietorships, business trusts, banking institutions, unincorporated organizations, entities recognized by a body politic and any other business or legal entities including governmental bodies and agencies.

8. The singular shall include the plural, and the plural shall include the singular, and the past tense shall include the present and future, the present shall include the past and future, and the future shall include the past and present.

9. The period of time covered by these discovery requests is without limitation, unless otherwise specified.

10. These discovery requests seek information as of the date of serving the responses and shall be deemed continuing so as to require further and supplemental responses in accordance with Federal Rule of Civil Procedure 26(e).

II.
ADMISSION REQUESTS

Pursuant to Rule 2.120 of the Trademark Rules of Practice of the Patent and Trademark Office and Rule 36 of the Federal Rules of Civil Procedure, Mendias & Milton, LLC, Opposer, directs the following admission requests to Applicant:

1. Admit that Opposer's Mark has been used continuously and exclusively in the United States since at least as early as April 1, 2008 in association with food preparation services and prepared meals.

2. Admit that Opposer filed an application for its MY FIT FOODS & Design mark on September 29, 2008, which subsequently registered on July 27, 2010 as U.S. Reg. No. 3,823,590.

3. Admit that Applicant filed the Application on April 19, 2010.

4. Admit that Opposer commenced used of Opposer's Mark prior to the filing date of the Application by Applicant.

5. Admit that Opposer's Mark is used association with services providing healthy food.

6. Admit that Opposer's Mark and Applicant's Mark both contain the words "fit" and "food."

7. Admit that Applicant's Mark and the services covered thereunder are directed at health-conscious consumers.

8. Admit that Applicant's Mark is intended to be used in association with services providing healthy food.

9. Admit that Opposer uses Opposer's Mark in Texas, California, Arizona, and Idaho.

10. Admit that Opposer's Mark and the services covered thereunder are directed at health-conscious consumers.

11. Admit that Opposer's Mark and Applicant's Mark are similar enough for consumers to believe that they originate from the same source.

12. Admit that Applicant was aware of Opposer's Mark when Applicant filed the Application.

13. Admit that Opposer's Mark and Applicant's Mark cover services that are likely to be directed through the same or similar channels of trade to the same or similar types of customers.

14. Admit that Opposer's Mark is directed at services involving healthy and nutritional diets.

15. Admit that consumers who see Applicant's Mark are likely to assume that there is a connection or association with Opposer.

16. Admit that the dominant portion of Applicant's Mark and Opposer's Mark is "FIT FOOD."

17. Admit that there is a likelihood that Applicant's customers will assume that the services covered under Applicant's Mark those covered by Opposer.

18. Admit that Opposer's Mark is well known and famous.

19. Admit that the registration of Opposer's Mark gives Opposer the exclusive right to use Opposer's Mark throughout the United States.

20. Admit that Applicant is not under a license with Opposer to use Applicant's Mark.

21. Admit that there is a likelihood of confusion Applicant's Mark with Opposer's Mark.

22. Admit that Applicant filed its Application after Opposer commenced use of Opposer's Mark.

23. Admit that Applicant filed is Application after Opposer filed an application for its MY FIT FOODS mark.

24. Admit that Applicant's use of the wording "FITFOOD" is subsequent to Opposer's use of the wording "FIT FOODS."

25. Admit that Applicant's Mark is not currently in use anywhere in the United States.

26. Admit that the term "FITFOOD" is virtually identical to "FIT FOODS."

27. Admit that Applicant is the junior user of FITFOOD.

28. Admit that Applicant's Mark is directed at services involving healthy and nutritional diets.

Dated: July 17, 2012

By: _____
Deborah L. Lively

THOMPSON & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1700
(214) 969-1751 (facsimile)

ATTORNEYS FOR OPPOSER
Mendias & Milton, LLC

517797 000002 DALLAS 2861554.1

Certificate of Service

I hereby certify that a copy of the foregoing OPPOSER'S FIRST SET OF REQUESTS FOR ADMISSION for Opposition No. 91201995 as served on Applicant FITFOOD LLC's email at fitfast@gmail.com and first class mail, on this 11th day of July 2012, in an envelope addressed to:

FitFast LLC
c/o Duke Richman
402 Heywood Ave.,
Orange, New Jersey 07050-2007

Deborah L. Lively

EXHIBIT C

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA/CME/mc

Mailed: November 14, 2012

Opposition No. 91201995

Mendias & Milton, LLC

v.

Fitfast, LLC.

Michael B. Adlin, Administrative Trademark Judge:

On October 23, 2012, opposer filed a motion to compel written responses to its interrogatories and document requests, as well as the production of documents. No consideration will be given to opposer's motion at this time because it fails to meet the requirements of Trademark Rule 2.120(e).

Specifically, Trademark Rule 2.120(e)(1) requires that a motion to compel: (a) "be supported by a written statement from the moving party that [it] has made a good faith effort … to resolve with the other party … the issues presented in the motion" but was unable to reach agreement; and (b) include copies of the requests for discovery, and if applicable, the responses thereto. TBMP § 523.02 (3d ed. rev. 2012). Here, however, while opposer sent a single letter to applicant noting applicant's failure to serve discovery responses, and claims to have initiated an otherwise unexplained "telephone

communication," there is no evidence in the record that opposer followed up on its single letter or what, if any, response it received to the "telephone communication." Opposer simply filed its motion leaving the Board to guess at how extensive opposer's efforts to meet and confer were and what response, if any, it received from applicant. *See Giant Food, Inc. v. Standard Terry Mills, Inc.*, 231 USPQ 626, 632 (TTAB 1986) ("applicant failed to meet the prerequisite imposed by Trademark Rule 2.120(e)" where "the only evidentiary support of applicant's efforts" submitted in support of the motion to compel was a single letter to opposer complaining of the insufficiency of opposer's responses); *Envirotech Corp. v. Compagnie Des Lampes,* 219 USPQ 448, 450 (TTAB 1979) (noting that the purpose of Trademark Rule 2.120(e) "is to save the Board the burden of ruling upon motions to compel in situations where the parties could work out their differences if they made a good faith effort to do so").

In addition, opposer failed to attach to its motion copies of the relevant interrogatories and document requests as required by Trademark Rule 2.120(e). *See* TBMP § 523.02; *Fidelity Prescriptions, Inc. v. Medicine Chest Discount Ctrs., Inc.*, 191 USPQ 127 (TTAB 1976) (copies of the discovery requests must be attached to the motion to compel to "enable the Board to render a meaningful decision on the motion").

The Board will consider a renewed motion to compel if opposer establishes that it has made a "good faith effort" to resolve the discovery issues with applicant and submits copies of the discovery requests still at issue, within the time allowed by Trademark Rule 2.120(e)(1). Opposer's requests for admission are deemed admitted. Fed. R. Civ. P. 36(a)(3). Disclosure, trial and other dates remain as set in the Board's March 22, 2012 order.

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

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EXHIBIT D

United States of America

United States Patent and Trademark Office

Reg. No. 3,823,590

Registered July 27, 2010

Int. Cls.: 29 and 43

TRADEMARK

SERVICE MARK

PRINCIPAL REGISTER

MENDIAS & MILTON, LLC (TEXAS LIMITED LIABILITY COMPANY)
3333 ALLEN PARKWAY, #2507
HOUSTON, TX 77019

FOR: PREPARED MEALS CONSISTING PRIMARILY OF MEAT, FISH, POULTRY OR VEGETABLES, IN CLASS 29 (U.S. CL. 46).

FIRST USE 4-1-2008; IN COMMERCE 4-1-2008.

FOR: FOOD PREPARATION SERVICES FEATURING FRESH, PROPERLY PROPORTIONED, HEALTHY MEALS DESIGNED TO FUEL METABOLISM AND BURN FAT AND MADE TO ORDER FOR DELIVERY OR PICK UP, IN CLASS 43 (U.S. CLS. 100 AND 101).

FIRST USE 4-1-2008; IN COMMERCE 4-1-2008.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "FOODS", APART FROM THE MARK AS SHOWN.

THE COLOR(S) BLACK, GREY, RED, AND WHITE IS/ARE CLAIMED AS A FEATURE OF THE MARK.

THE MARK CONSISTS OF A STICK FIGURE IN THE COLOR BLACK WITH A WHITE FACE AND A BLACK BEARD AND WEARING A GRAY CAP WITH BLACK TRIM. THE STICK FIGURE HAS ITS LEGS CROSSED AND IS LEANING ON THE STYLIZED WORDS "MY FIT" WHICH APPEAR IN THE COLOR RED AND WHICH IS STACKED ON THE STYLIZED WORD "FOODS" WHICH APPEARS IN THE COLOR BLACK AND IS STACKED ON THE STYLIZED PHRASE "EAT FIT. LIVE FIT." WHICH APPEARS IN THE COLOR GRAY.

SER. NO. 77-581,411, FILED 9-29-2008.

MARCIE MILONE, EXAMINING ATTORNEY

David J. Kappos

Director of the United States Patent and Trademark Office